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No. 601

IN THE

Supreme Court of the United States

October Term, 1959

HORTON & HORTON, INC., *Petitioner*

-versus-

THE SS ROBERT E. HOPKINS, HER ENGINES, BOILERS, ETC., AND TIDE WATER ASSOCIATED OIL COMPANY, INC., *Respondents*

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on June 30, 1959.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the United States District Court is unreported and appears at R., 328. It is printed in Appendix "B", *infra*, p. 36. The opinion of the Court of Appeals for the Fifth Circuit, printed in Appendix "A" hereto, *infra*, p. 29, is reported in 269 F. 2d 914, 1959 A.M.C. 1681.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 30, 1959. (P. 29, *infra.)* The order denying rehearing was entered on October 2, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

Is a vessel lying hove-to in an impenetrable fog when sighted upon the radar scope of a steamer proceeding at full speed into that fog "a vessel the position of which is not ascertained" under Article 16 of the Navigation Rules for Inland Waters (33 U.S.C., Sec. 192), so that the radar equipped vessel must immediately stop her engines and navigate so as to avoid collision?

Is the so-called common law tort doctrine of "last clear chance" applicable in admiralty to collisions of vessels in navigable waters?

Is an unmanned barge, without motive power, in tow of a tug whose crew placed upon that barge an improper light (white instead of red) liable *in rem* independently of the tug, so that the barge and the tug (held at fault in other respects) must bear two-thirds (each one-third)

of the damages from a collision held caused also by the steamer which sank the barge?

STATEMENT

The SS ROBERT E. HOPKINS and its operating owners were proceeded against by petitioner in the Southern District of Texas for the sinking of petitioner's barge while in tow of the tug MAYE.

The facts are established by uncontradicted testimony of persons aboard the SS ROBERT E. HOPKINS and the tug MAYE and are actually not in dispute.

The distance from Lynchburg Ferry in the Houston Ship Channel (logged by the Robert E. Hopkins as passed at 11:13 p. m.) to Beacon 70, where the vessel's anchor was dropped at 11:28 p. m., measures at least 2.7 miles. The vessel's average speed was therefore 10.8 miles, at night, in a fog that was visible ahead at the ferry and which was thick (if the vessel's captain is to be believed) at least 1.5 miles away from the point of collision at Beacon 70 and which was for all practical purposes impenetrable when the anchor was dropped. R. 246-247.

During the last 1.5 miles of this foggy night run the vessel knew of the presence of two tows, one on each side of the channel. Only during the last three minutes of the run was the vessel's speed reduced, to about one mile speed at the dropping of the anchor according to the captain, R. 277, or to about three miles speed according to the pilot, R. 228.

The captain of the tank vessel testified that as his ship was thus proceeding he sighted on the ship's radar screen (*not* visually) two tugs with their tows. These were first

sighted by radar when a mile and a half away. They were apparently on opposite banks of the channel. R. 282-283.[1]

[1] "Question: Captain, briefly, if I understood your testimony, you had no knowledge of any vessels ahead of you in the channel before you anchored, and you anchored simply because the fog was so dense it wasn't safe to navigate, is that correct?

"Answer: No. We had knowledge of the tows. We knew there was two tows moving in an opposite direction. I saw those two tows in the radar on the scope, but the one was on the wrong side of the channel, which we found out later was the tug Mave with the barges, but when the—just before we anchored the last I saw of that tow she was maybe at the most three-quarters of a mile from us.

"See, the scope that I used in the channel, it was an RCA radar. The shortest scope is only one and a half miles, and the Houston channel is so narrow that—the channel is very small on the scope, and if an object is too close to the bank, it merges with the bank; then you can't see it no more. And the last I saw of that tow was when she was approximately, at the most three-quarters of a mile off. We anchored right after that.

"Question: Now, so that you did yourself see upon your radar in the channel ahead of your vessel two tows or two objects you took to be tows, is that correct?

"Answer: That is correct." (R. 272-273.)

He reaffirmed this volunteered testimony repeatedly. R. 276, 283, 288, 289, 291, 297.

As to the presence of fog and the vessel's knowledge of it, from the time the vessel passed Lynchburg Ferry, the captain testified:

"Question: So that as you came up the channel there you actually never yourself kept a lookout?

"Answer: No.

"Question: You were watching the radar?

"Answer: I was watching the radar.

"Question: It was foggy enough so that you felt it was wiser for you to watch the radar than to keep the lookout?

"Answer: **I watched the radar only from the time the visibility started to get bad, but before that I was in the wheelhouse talking with the pilot.**

"Question: So that as soon as you began to have reduced visibility you went to the radar?

"Answer: That's right.

With such knowledge, the steamer proceeded ahead farther into the fog at its full speed. The captain further testified that when one of the tows disappeared from the radar screen at three-quarters of a mile the ship prepared to anchor. The pilot testified they prepared to anchor when the fog became too dense to navigate. R. 209, 230, 231; 236. The ship stopped and dropped her anchor between the tug MAYE and the other tug and barges on the bank opposite the tug MAYE, R. 269, 283, in fog so dense the pilot could not see beyond the ship's bow and none of the two tugs nor their barges nor any of their lights could be seen, in a four hundred-foot-wide channel. R. 209, 210, 229, 239, 254, 276, 281, 288, 302, 307, 316.

It was further established that the tug MAYE, pushing ahead of her two barges in tandem, with the tug on the starboard quarter of the stern barge, slowed her engines to bare steerageway upon first encountering fog, R. 48, 49, and commenced blowing fog signals and called up a lookout. R. 74. Fog signals from another tug with tow were heard, and the MAYE immediately stopped her engines.

"Question: And it was some time before you saw these objects come ahead on the screen a mile and a half away, is that correct?

"Answer: It was some time before that." (Emphasis ours.) (R. 297.)

"Question: Did the visibility become bad at about the time you passed the Lynchburg Ferry?

"Answer: I don't remember.

"Question: But you were ceratinly about a mile and a half away from the nearest one of these vessels when you knew that the visibility was reduced by fog?

"Answer: It was more than that when I saw these vessels, that's right, in the radar. They were a mile and a half from me and it was thick already.

"Question: Already thick then?

"Answer: Yes." (R. 282-283.)

His testimony to the same effect appears also at R. 269, 273, 276, 282.

R. 33, 34. (The engines were kept stopped and not started up again until after the barge was sunk, more than ten minutes later. R. 34.)

The MAYE talked by radio-telephone to the other tug, who told the MAYE it lay against a bank in fog so dense it could not tell where it was. R. 33. Drifting with the tug's engines stopped, the MAYE's tow went aground, and the lookout on the bow barge tried to ascertain on which bank the tow was grounded by sounding with a pole. R. 34, 35. An approaching steamer's fog whistle was heard, and the lookout on the barge was recalled to the top of the wheelhouse. R. 35.

Almost immediately the upper works of a steamer were sighted above the tow, and the lead barge was struck and sunk and the other barge and tug shoved violently backward into a navigating beacon. R. 36, 37, 157. The steamer, identified when the fog lifted as the ROBERT E. HOPKINS, dropped anchor and stopped just past the tug MAYE. R. 38, 101, 139.

After the fog lifted those on the steamer first saw visually the two tugs with their tows and their lights, on opposite banks of the channel. R. 229, 238, 289, 316, 317.

The MAYE had all proper navigation lights upon the tug, but her crew had placed on her bow barge a white light instead of the red light called for by the Pilot Rules for these waters. Except for its color, the crew testified it was a bright and proper light. R. 32, 61, 64, 111, 112, 142.

From these facts the trial court found the steamer at fault in several respects (admitted on appeal by respondents), and found the tug at fault also in not knowing her position in the channel, "in displaying improper lights in

her tow, in violating the narrow channel rule, in failing to keep a proper lookout, and in failing to advise the HOPKINS of her position with a searchlight." The damages were equally divided.

The decision below was affirmed on appeal, but the Court of Appeals made an additional finding that the improper lighting was an independent fault of the barge, and modified the decree to charge the barge with one-third of the damages, reducing the respondents' liability from one-half to one-third.

Neither court mentioned the vital facts that distinguish this case from the ordinary fog collision cases, namely, that the steamer had sighted the vessels lying stationary ahead of her in the channel *by radar* a full mile and a half away and nevertheless with this knowledge ran at full speed into the dense fog toward these vessels and only commenced to stop in zero visibility and too late to avoid colliding with one of the vessels whose presence but whose position was not known.

In the conclusions of law with respect to the fault of petitioner's vessels, petitioner respectfully submits the courts below are clearly wrong and have ignored in vital respects the undisputed evidence.

REASONS FOR GRANTING THE WRIT

1. There have been in recent years a great number of collisions between radar-equipped vessels, with an appalling loss of life and property. Petitioner respectfully submits that the public interest calls for a clear statement by this Court at this time that a ship with radar-given knowledge of the presence ahead of it in fog, or conditions of reduced visibility, of another ship must treat that radar-sighted

vessel as one whose presence is known but whose position is not ascertained, under Article 16 of the Navigation Rules for Inland Waters (33 U.S.C., Sec. 192) and must immediately stop her engines and navigate to avoid collision.

There are, to petitioner's knowledge, no decisions on whether or not under Article 16 such a vessel is one whose position is not "ascertained" except a recently decided District Court case, *Weyerhaeuser Steamship Company v. United States of America*, N.D. Cal., 1959, 174 F. Supp. 663, 1959 A.M.C. 1869, which decides that such a radar-sighted vessel is one whose position *is* ascertained—a decision clearly wrong, it is submitted, and like the decision of the Court of Appeals herein one likely to promote collisions rather than prevent them.

Following World War II a new navigating aid made its appearance as equipment on oceangoing vessels. This was radar. Since it enabled the navigator to see upon a darkened screen the rough outline of objects ahead of the vessel at considerable distances before these objects could be visually sighted, it was seized upon as a valuable aid to navigation and placed upon vessels to help them navigate more safely at nighttime and in fog and under other conditions of reduced visibility.

Sad to say, its high degree of helpfulness caused an even higher degree of reliance to be placed upon it, and vessels apparently have placed so much reliance upon it that (as in the present case) its use has undoubtedly led to many collisions that might otherwise have been avoided.

Petitioner respectfully brings to this Court's attention those best known to the public, described in the public press, a said array of marine disasters:

The CG Eastwind and the ST Gulfstream

New York Times, January 20, 1949, Page 1, Column 1:

> "10 Coast Guard men died and 21 were burned . . . when their vessel was rammed amidships in predawn fog. . . ."

New York Times, January 20, 1949, Page 3, Column 3:

> "The crew of the rescue ship *Junior* . . . reported that men from the *Eastwind* had said the *Gulfstream* had showed up in the icebreaker's radar screen. Why the collision could not have been avoided, if this were true, no one could guess last night."

New York Times, January 26, 1949, Page 49, Column 1:

> "Captain Glynn said he retired at 10 p. m. and 'fell asleep reading.' A half hour later he was advised by the bridge that a vessel was spotted on the radar screen approaching the three mile limit he had set but that the ship would pass comfortably. He did not hear from the bridge again until the crash which awakened him."

Other references to this collision are made in the *New York Times*' issues of January 22, 1949, page 8, column 1; January 26, 1949, page 49, column 1; January 27, 1949, page 45, column 1; January 28, 1949, page 43, column 8; May 12, 1949, page 55, column 2.

S/T Esso Greensboro - S/T Esso Suez

New York Times, April 21, 1951, Page 1, Column 1:

2 TANKERS COLLIDE: 38 BELIEVED DEAD.

> "New Orleans, April 20. — Two oil tankers collided in a dense dawn fog in the Gulf of

Mexico today with a probable death toll of thirty-eight. Both ships were swept by flames after the crash."

New York Times, April 22, 1951, Page 55, Column 1:

"One man on the Suez . . . died in the crash. Another . . . died from burns, three other crewmen were burned. . . .

"All of the other casualties were from the Greensboro. Only five of the forty-two men aboard have been picked up alive."

New York Times, April 25, 1951, Page 59, Column 1:

"Captain Geick testified he spotted the other tanker on his radar screen six miles off, and changed his course three times in a desperate attempt to get out of the path of the fast moving ship."

(N.B. Captain Edwin C. Geick was master of the Esso Suez.)

Other references to this collision are made in the *New York Times*' issues of April 28, 1951, page 31, column 5, and November 1, 1951, page 59, column 7.

SS Jacob Luckenbach - SS Hawaiian Pilot

New York Times, July 15, 1953, Page 5, Column 6:

49 SAVED ON COAST AS 2 SHIPS COLLIDE

THE JACOB LUCKENBACH SINKS IN SAN FRANCISCO BAY FOG — OTHER FREIGHTER DAMAGED

"Two freighters collided in a heavy fog outside the Golden Gate today and the outbound Jacob

Luckenbach, enroute to the Far East . . ., sank soon after. . . .

"The other ship, the Hawaiian Pilot . . . with nearly thirty feet of her bow ripped away by the impact, stood by to rescue the forty-nine members of the stricken ship's crew, then steamed slowly into port.

"The Luckenbach . . . was picked up by the Hawaiian Pilot's radar 'a considerable distance away' from the crash scene, according to Lyman Henry, a Matson Company attorney. . . ."

In recalling this collision after the Andrea Doria-Stockholm disaster, it was reported by the *New York Times*, July 26, 1956, page 14, column 4:

"In July, 1953, the freighter Jacob Luckenbach went to the bottom after a crash with the Hawaiian Pilot outside San Francisco's Golden Gate. Each skipper testified at the Coast Guard inquiry that he saw the other vessel on his radar screen and tracked it for several miles before the collision. One mistook the other for a stationary lightship; the other recognized the object as a moving vessel, but thought he would clear it safely."

M/V Andrea Doria - M/V Stockholm

There is a full account of this major marine disaster, said to be the first major collision between two crack trans-Atlantic liners, in the recently published book *Collision Course*, by Alvin Moscow, 316 pp., New York, Putnam.

There are of course many references to it in the public press. Please see particularly:

New York Times, July 27, 1956, Page 1, Column 8:

"The Andrea Doria and the Stockholm crashed in deep fog off Nantucket Light at 11:22 p. m., Wednesday, apparently because of 'radar blindness.' The Andrea Doria sank within a mile or two of where she was wounded."

New York Times, July 27, 1956, Page 7, Column 7:

SAFETY MEN PUZZLED BY FAILURE OF RADAR TO PREVENT COLLISION

"Radar experts said that if the equipment on the two vessels was being properly and alertly used the crash would not have occurred. They discounted reports that sunspots, which have somewhat disturbed radio reception, might have blotted out the radar effectiveness or that fog may have done so.

"As far as the role of radar in the disastrous meeting of the two speeding liners is concerned, the consensus was 'man failure'."

New York Times, July 28, 1956, Page 4, Column 4:

"Captain Nordenson said the Stockholm carried two radars with equipment to penetrate fog and that both were in good working condition. . . ."

New York Times, July 31, 1956, Page 1, Column 11:

"The Andrea Doria saw the Stockholm on radar and tracked the Swedish ship for some time before last Wednesday night's collision, the Italian line said yesterday. . . .

"Giuseppe Ali, the line's Director-General here, confirmed the radar watch. He did so after reports leaked out that the vessel's master, Capt. Piero

Calamai, had made statements to that effect to the crew. . . .

"The disaster . . . caused casualties on both ships whose tally last night was revised to twenty-five known or presumed dead and thirty still to be accounted for."

New York Times, October 16, 1956, Page 29, Column 5:

"The captain of the Italian liner Andrea Doria conceded yesterday that radar had given him time to avoid a collision with the . . . Stockholm. But he also said radar had convinced him there was no danger of collision.

"Capt. Piero Calamai of the Doria testified under cross examination in federal court pre-trial hearings."

New York Times, December 7, 1956, Page 21, Column 4:

"The navigating officer of the Italian liner Andrea Doria conceded yesterday that if he had plotted the course of the Swedish liner Stockholm he would have realized the two ships were drawing closer together.

"The witness was Curzio Franchini, 38 year old Senior Second Officer, who was on radar watch when the ships collided last July 26."

Life Magazine, August 6, 1956, Page 29:

"Why they hit was still unexplained. On land, Captain Nordenson acknowledged that his radar was working both before and after, and said, 'I don't want to blame anybody.' A Rome newspaper quoted Captain Calamai as saying that he had had the Stockholm on his radar and for 20 minutes had been asking her to change course."

SS Constitution -M/T Jalanta

New York Times, March 2, 1959, Page 1, Column 5:

CONSTITUTION CUTS BOW FROM TANKER IN FOG OFF HARBOR

"The American Export Liner Constitution and the Norwegian oil tanker Jalanta collided in fog outside New York harbor shortly before 11:00 a. m. yesterday. No one was injured. . . .

"Both vessels are listed in Lloyd's Register as fitted with radar. Capt. Ludwig Molvig, a representative of Norwegian Underwriters, Inc., . . . which handles insurance for all Norwegian flag vessels here, said the Jalanta was radar-equipped."

New York Times, March 4, 1959, Page 62, Column 6:

CONSTITUTION RADAR LOST TANKER AT 2 MILES BEFORE CRASH HERE

"Capt. James W. LaBelle, master of the luxury liner, told a three-man Coast Guard Board of Investigation here yesterday that he first observed the tanker at a distance of seven and a half miles. At that time the Constitution was proceeding north to the lightship at about sixteen knots.

"Visibility at the time . . . was fluctuating from one-quarter to one-half mile, opening up to one mile at times. Capt. LaBelle, who was at the radar scope, said he lost the freighter at two miles because of 'sea return,' confusion on the radar scope caused by wave reflection. . . ."

New York Times, March 6, 1959, Page 50, Column 4:

JALANTA STOPPED, CAPTAIN TESTIFIES

"The Norwegian tanker Jalanta was stopped 'dead in the water' when the liner Constitution

struck her last Sunday at 'very great speed,' the tanker's master said here yesterday.

'Captain Lovald also testified that he did not think that his radar had picked up the Constitution at all. He explained that 'sea return' (confusion on the radar scope caused by wave reflection) had blanked out his radar for a two mile circle and up to five miles on his starboard side, the side from which the ship was struck."

M/V Santa Rosa -M/V Valchem

New York Times, April 1, 1959, Page 32, Column 1:

"The officer in charge of the tanker Valchem said yesterday that he had ordered a change in course to the right twenty minutes before the liner Santa Rosa collided with the tanker at 3:10 a.m. last Thursday off Atlantic City."

(The second mate of the Valchem, testifying at a Coast Guard Board of Inquiry:)

"Mr. Lupton related that he first saw an object about eight miles ahead on his radar scope at 2:50 a.m. . . .

"At 3:00 a.m. he said he heard a fog signal on his port (left) side forward of the beam and stopped the engines. A glance at his radar then showed, he said, that the target was just two-and-half miles away.

"The Santa Rosa and the Valchem collided in fog about twenty-two miles east of Atlantic City. Four crewmen of the Valchem were killed."

New York Times, April 2, 1959, Page 62, Column 1:

"In the eight minutes before the crash, Mr. Welles said, he was able to complete two radar

plots for the Valchem. The second, made when the tanker was three miles away, showed that she would pass the Santa Rosa three-tenths of a mile to the liner's right, he said. Mr. Welles said he had told the captain that."

(Note: Welles was second officer of the M/V Santa Rosa.)

New York Times, April 3, 1959, Page 54, Column 1:

"A third plotting would have established that the tanker was swinging to her right, it was brought out during Mr. Welles' testimony. . . ."

Time Magazine, April 6, 1959, Volume 73, Page 23:

"The main mystery: both ships were equipped with radar, each was aware of the other's presence —so what happened?"

The ships involved are all modern, presumably manned by fine crews and officers, and were among the finest vessels afloat.

These disasters point up the statement of Judge Medina in *Polarusoil-Sandefjord*, 2 C.C.A., 1956, 236 F. 2d 270, 1956 A.M.C. 1779, as follows:

"Indeed, what happened here demonstrates how radar may, when not properly used, increase the chances of collision . . . While a matter of conjecture, it seems not unlikely that the Sandefjord would have proceeded more cautiously had she not been equipped with radar, which under the circumstances, gave a false sense of security."

They also demonstrate the gross fault of the ROBERT E. HOPKINS, which by the testimony of her captain pro-

ceeded at full speed directly into a fog with radar-given knowledge of the presence in that fog of small vessels lying hove-to and helpless in her path.

How can there be any doubt that such navigation is condemned by the laws governing navigation as grossly negligent?

Article 16 (of the Inland Rules, 33 U.S.C., Sec. 192, and of the International Rules, 33 U.S.C., Sec. 145n) provides that in fog a vessel must go at a moderate speed, having careful regard to the existing circumstances. It further provides:

> "A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

While of course the fog signal gives notice of the presence of another vessel in the fog in no way as accurately as the knowledge acquired by the "pip" or outline on a radar screen, *in neither case is there a visual sighting* and certainly until such a sighting that other vessel's position is *not* "ascertained," it is respectfully submitted.

A radar "pip" or outline is after all *not* a picture of the ship; it gives only a relative bearing, and its accuracy is limited to gross distance, *not* exact distances and bearings such as are acquired by a visual sighting. While of immense value in warning a radar-equipped vessel of another's presence, a radar "pip" is *not* a picture of the object: It is only a blurred outline of inaccurate proportions requiring careful analysis and interpretation to give more knowledge than merely that there is an object at the

relative distance and bearing shown. It does not (short of careful and repeated plotting) give the speed of the object (if any) nor its course, and it gives only a rough approximation of its size. It can be obscured by taller objects behind the "target" or by surface irregularities ("sea return") at times. Further, the outline changes with the scale used; e.g., since the size of the radar screen is unchanging for that particular radar set, where a three-mile scale is used the size of the "pip" or object's outline would be one-half its size as shown where the one-and-a-half-mile scale is used. Therefore, while both scales would show the *approximate* location of the object, neither would show the object within accurate distances of feet, the fundamentally required information if a collision is to be avoided in the close quarters where collisions occur.

Further, since a radar-shown object is only shown relatively and rather obscurely, only the most sharply defined and extreme course changes can be seen, and these because of the small scale size of the object are difficult to detect until well along to completion.

There can therefore be no doubt that while the radar-given knowledge is much better than knowledge acquired by hearing a fog signal, it certainly is not even remotely as good as knowledge gained by a visual sighting.

Therefore, petitioner respectfully submits Article 16 should be held to control radar-navigated vessels, and to require them, just as vessels hearing fog signals, immediately on learning of another vessel's presence to stop their engines and to take steps to avoid collision. It should be held that the other vessel's position is *not* "ascertained," for undoubtedly it has not been: only its *approximate* location or presence has become known.

Certainly here if the SS ROBERT E. HOPKINS had obeyed the admonition of Article 16 and at once stopped her engines on seeing ahead of her in the channel upon her radar the two tows this collision *could not* have occurred. Instead she navigated just as the several vessels referred to above, parties to those major marine disasters, did: she knew of the *approximate* location of the vessels ahead and went rushing on, serenely confident that she could stop in time to avoid collision. In doing so she violated grossly the fundamental rule of safe navigation in fog and *solely* caused the collision which followed.

Finally, petitioner respectfully submits that holding Article 16's requirement that engines be stopped and the vessel proceed with caution is applicable also to radar-gained knowledge of another vessel's presence is consonant also with the requirements of Articles 27 and 29 of the Inland Rules (33 U.S.C., Secs. 212 and 221).

These expressly provide that in obeying the rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which render a departure therefrom necessary to avoid immediate danger, and that nothing in the rules will exonerate any vessel for the neglect of any precaution which may be required by the special circumstances of the case. Their observance has been strictly required by the decisions of the court in *The New York*, 1899, 175 U.S. 187, 20 S. Ct. 67, and *Postal Steamship Company v. The El Isleo*, 1940, 308 U.S. 378, 380, 60 S. Ct. 332.

How can it be reasonably argued that to hold radar-given knowledge of another vessel's approximate location is an ascertainment of that vessel's position, so that the radar-equipped vessel could proceed without reduction of speed and rely on her ability later to take steps to avoid collision, is not directly contrary to the admonitions of

Articles 27 and 29? These articles, and the decisions of this Court, expressly require all ships in fog to navigate with great care: to relax the fog rules for radar-equipped ships would be directly contrary to Articles 27 and 29.

2. The Court of Appeals for the Fifth Circuit is committed to the view that the so-called "last clear chance" doctrine of the common law is applicable as a principle of proximate causation in marine collision cases. It is respectfully submitted that that principle of proximate cause *is* applicable in admiralty, and that the decision of the Court of Appeals in this case is directly contrary to its own decisions so holding, as well as contrary to the decision of this Court in *The Laura Maersk*, 1943, 320 U.S. 462, 1943 A.M.C. 1321.

In the instant case the evidence, undisputed in character, established that the ROBERT E. HOPKINS proceeded at full speed into dense fog when she knew from having sighted them on her radar of the approximate location of two tows, lying stationary on each side of the channel. She only anchored when visibility was zero, as the Court of Appeals correctly held, and as she slowed to drop her anchor sank the MAYE's barge, lighted by a white instead of a red light.

There can be no doubt that had the ROBERT E. HOPKINS stopped her engines and anchored when she first knew of the other vessels' presence by her radar sighting that there would have been no collision. That it was her duty so to stop and to anchor or to proceed so slowly no collision with the stationary barge could have occurred is established by numerous cases, even if the two were improperly lighted or at fault in the respects found (which is *not* admitted). After all, the barge's approximate loca-

tion was known, and there is "no right of way into collision." *The America*, 1876, 92 U.S. 432; *The Non Pareille*, D.C. N.Y., 1887, 33 F. 524.

In *The Laura Maersk*, supra, this Court held the vessel moving in fog at an excessive speed at fault even though the stationary vessel was improperly moored.

The Court of Appeals' decision is also contrary to its own decisions in *Socony-Vacuum Oil Company, Inc. v. Smith*, 5 C.A., 1950, 179 F. 2d 672, 1950 A.M.C. 445, where the tug and tow run down had no lights and were on the wrong side of the channel, and the *Tug Percheron*, 5 C.A., 1957, 246 F. 2d 135, 1957 A.M.C. 1941, where the vessel struck was also stationary, and its decision on the applicability in admiralty of the "last clear chance" doctrine, *Crawford v. Indian Towing Co.*, 5 C.A., 1957, 240 F. 2d 308, 1957 A.M.C. 250.

The so-called "last clear chance" doctrine, dramatically applied first in *Davies v. Mann*, 10 M. & W. 546 (Ex. 1842), the hobbled donkey case, has been held expressly applicable to marine collisions by decisions in the Second and Fifth Circuits. Please see the *Sanday*, 2 C.C.A., 1941, 122 F. 2d 325, 1941 A.M.C. 1249; *Cornelius Vanderbilt*, 2 C.C.A., 1941, 120 F. 2d 766, 1941 A.M.C. 1245, and *Hellenic Lines, Ltd. v. The Exmouth*, 2 C.A., 1958, 252 F. 2d 473, 1958 A.M.C. 1018, where under the facts its application was refused, and *Crawford v. Indian Towing Co., supra.*

Its applicability to admiralty collisions has been denied and doubted elsewhere. Please see *Norman B. Ream*, 7 C.C.A., 1918, 252 F. 409, and *Richmond v. Tugs Connie C. Cenac, et al.*, E.D. La., 1957, 157 F. Supp. 397, 1958 A.M.C. 548, and the discussion in *Griffin on Collision*, p. 490.

The true rationale of the rule in this matter, petitioner submits, which condemns the holding of the Court of Appeals here, is expounded by the Court of Appeals for the Fifth Circuit in the appeal in the *Richmond v. Tugs Connie C. Cenac, et al., supra,* case, styled *Cenac Towing Co. v. Richmond*, 5 C.A., 1959, 265 F. 2d 466.

There it is pointed out that the question is really one of proximate cause, in admiralty as at common law, and that if the negligence of one vessel is simply a condition and the continuing negligence of the other is the actual cause of the collision, then it is immaterial whether the basis for freeing the vessel whose negligence did not contribute to cause the collision be placed upon the "last clear chance" doctrine or simply be held not proximate.

There can be no doubt that in England there is no difference between the rules of law and of admiralty as to what amounts to negligence causing collision, and that the principle of *Davies v. Mann, supra,* is applicable in admiralty. Please see the discussion in *Marsden's Collisions at Sea,* 10th Ed., p. 26, referring to the holdings of Lord Blackburn in *Cayzer, Irvine & Co. v. Carron Co.* (1884), 9 App. Cas 873, 882, and *The Khedive* (1880), 5 App. Cas. 870, 892; and Lord Simon in *The Boy Andrew (Owners) v. St. Rognvald (Owners)* (1948), A.C. 140, at p. 148.

There can be no doubt that had the ROBERT E. HOPKINS, admittedly knowing the approximate location of the stationary vessels ahead of her, complied with the requirements of Articles 16, 27, and 29 of the Navigation Rules and stopped her engines and anchored or proceeded cautiously there would have been no collision. Any possible negligence of the tug MAYE and the barge *could not*

have contributed to cause the collision. *The Pennsylvania*, 1873, 19 Wall. (86 U.S.) 125.

It must be borne in mind here that the approximate location of the tug and her barges was known to the steamer and that the steamer anchored in impenetrable fog immediately after she had sunk the barge.

How can any stronger argument for holding the ROBERT E. HOPKINS solely at fault, and establishing her proximate negligence be made than the pilot does by his testimony? He testified that if he had known what the captain testified that he knew, the ROBERT E. HOPKINS *could* have been stopped, *should* have been stopped, and *would* have been stopped. His testimony was as follows:

"Q. If the Captain of the ship, Captain Blanc, I believe his name is, had told you he saw these two tows, one on each side of the channel, on the radar, and a mile and a half distance from them, you had ample time to stop your ship in that time?

A. Yes, I would have stopped.

Q. You would have stopped it, wouldn't you?

A. Yes.

Q. You certainly could have slowed it down from your full ahead, couldn't you?

A. That's right, it would have been foolish to go on.

Q. And then if he had told you when you were three fourths of a mile from these tugs at the time when he's testified one of them disappeared from sight, the tug Mave, you certainly would have stopped then, wouldn't you?

A. At that distance I believe I would have put her into the bank.

Q. You would have certainly slowed down at three fourths of a mile?

A. I believe I would have taken it for a bank.

Q. You don't think it's wise to run into a fog at nine knots when you know there are tugs on each side of the channel?

A. The reason I kept going, I heard no signal of fog or danger. if I had heard a danger signal, which any vessel lost in the fog, if he hears another one coming because there is always a danger of collision if you don't know which side of the channel you are—

Q. Certainly.

A. —throwed her hard over, let her nose go up on the mud because we often do that.

Q. It wouldn't endanger the ship, but save the life of the men and tugs?

A. Yes, that is the idea in doing it.

Q. If you run into fog with tows ahead of you, you can lose men quick, couldn't you?

A. I'd hate to be in a tug with a ship on top of me." (R. 251-252).

Petitioner respectfully submits that any doubt existing concerning the applicability to admiralty causes of the rule of *Davies v. Mann, supra,* the so-called last clear chance doctrine, should be set at rest at this time, and that the circumstances of this case call for freeing the tug MAYE and its barge of any causative fault here by the application of that principle of proximate causation.

And equally clearly applicable is The Pennsylvania doctrine.

3. The decision of the Court of Appeals here in holding the unmanned barge *in rem* for one-third of the damages for faults of the tug's crew in placing upon her an improper light and holding the tug *in rem* for another one-third for her faults, is directly contrary to the recent holding of this Court in *Boston Metals Company v. The SS Winding Gulf*, 1955, 349 U.S. 122, 75 S.Ct. 649, 1955 A.M.C. 927, and is directly contrary to the rationale of the holdings of this Court in *Sturgis v. Boyer*, 1860, 65

U.S. 110, 16 L. Ed. 591; *The Eugene F. Moran*, 1909, 212 U.S. 466, 29 S. Ct. 339, 53 L. Ed. 600, *The Connecticut*, 1881, 103 U.S. 710, 712, 26 L. Ed. 467, and *Liverpool, Etc., Navigation Co. v. Brooklyn Eastern District Terminal*, 1919, 251 U.S. 48, 40 S. Ct. 66, 64 L. Ed. 130.

It is also directly in conflict with the holdings of the Court of Appeals for the Fourth Circuit in *Baltimore Transportation Co. v. H. L. Walker, et al.*, 4 C.C.A., 1925, 3 F. 2d 921, 1925 A.M.C. 652, and *The John D. Rockefeller*, 4 C.C.A., 1921, 272 F. 67.

Here the barge held liable *in rem* had no crew and no motive power and was in complete custody and control of the tug MAYE and that tug's crew. The light held by the Court of Appeals improper, on account of which the barge was held at fault, was placed upon the barge by the crew of the tug.

It is a matter of public importance in the maritime industry that unmanned barges in tow of tugs *not* be held at fault for the wrongful acts of their custodians. A great many unmanned barges are employed upon the nation's waterways, in charge of tugs that propel them and whose crews are responsible for them, and it is a matter of much importance that the liabilities of the tugs and of the barges in such cases be clear. The law that a vessel in control of another as a passive instrument in that other's care cannot be held at fault for the negligent acts of the active vessel or its crew has been long established, and a decision such as that of the Court of Appeals here unsettles the law as to such barges and unmanned vessels and creates confusion and uncertainty. It is respectfully submitted that it should be reversed as clearly erroneous.

There can be no doubt that since the decision in *Sturgis v. Boyer*, *supra*, that a vessel in tow of another caused

to collide by that other whose fault caused the collision is not liable *in rem* for the collision—the active wrongdoer is the vessel held responsible and liable *in rem*.

These principles have been followed in many cases, and particularly in the case of an unmanned barge (such as the one here) in tow of a tug whose crew placed improper lights upon the tow. In like circumstances as the instant case, this Court held the barge free from fault. Please see *Boston Metals Company v. The SS Winding Gulf, supra*, where the decision of the Court of Appeals for the Fourth Circuit, reported at 209 F. 2d 410, 1954 A.M.C. 183, setting forth the usual rule but holding it changed by a contractual agreement was reversed on the ground that the contractual agreement was invalid, this Court thus affirming in this recently decided case the long-established rule.

Further, the Court of Appeals' holding below is directly contrary to the holding of the Court of Appeals for the Fourth Circuit in *Baltimore Transportation Company v. H. L. Walker, et al., supra*. Since the opinion covers clearly the case at hand (being quite similar in its facts to the facts of the instant case) and distinguishes most of the cases cited by the court below to support its decision, petitioner quotes at length from the decision as follows:

> "At the time of the collision there was only one light on the scow. Its owner did not undertake to furnish lights nor did he have any representative on it. The owner of the tug had contracted to transport the scow and to take entire charge of its navigation. Under such conditions the owner of the scow was responsible for its seaworthiness: The tug was responsible for the navigation of the scow and for placing lights necessary for its safety and the safety of other vessels. Sturgis vs. Boyer, 24 Howard 110, 122; The Connecticut, 103 U.S. 710; Bisso Towboat Co. vs. Ala-

bama & New Orleans Transportation Co., 271 Fed. 658, 660; In Re Walsh, 136 Fed. 557, 559.

"In The Lyndhurst, 92 Fed. 681; The Nettie L. Tice, 110 Fed. 461; The Eugene L. Moran; The Charles E. Matthews; The Scows 15D and 18D, 143 Fed. 187, 154 Fed. 41, and 170 Fed. 928, the scows were held liable for collision due to the absence of lights required by the rules of navigation, for the reason that there were persons on the scows representing their owners. In The Komuk, 120 Fed. 841, where the tow was held liable along with the tug, it does not appear that the owner of the tow had a representative on it. In Foster vs. Merchants and Miners Transportation Co., 134 Fed. 964, the tug and tow were held liable for the absence of lights on the tow, but there was no discrimination between them for the reason that they had the same owner.

"The contention that the owner of the scow is responsible because he did not provide a place for the lights is not well founded. The evidence showed that the lights could be sufficiently attached with three or four nails and a scantling and that no permanent fixture was necessary. We think, therefore, the District Judge was right in exempting the owner of the scow and placing the responsibility for the lacking light on the owner of the tug."

The decision of the Court of Appeals is directly contrary to the rationale of its own decisions in cases where two tugs furnishing power for a tow bring the tow into collision. It is established by the cases in the Fifth Circuit that only the tug in command can be held liable *in rem* and the other tug will be held free from fault for the collision if she obeyed as given the orders of the controlling tug. Please see *Moran Towing & Transportation Co. v. Empresa Hondurena de Vapores, et al.*, 5 C. A., 1952, 194 F. 2d 629, 632, *In Re Walsh*, 5 C.C.A., 1905, 136

F. 557, and *Old Time Molasses Co. v. United States*, 5 C.C.A., 1929, 31 F. 2d 963, 1929 A.M.C. 687.

As Judge Learned Hand pointed out in commenting upon these cases and declaring the *in rem* fiction should not be extended in *Oil Transfer Corporation v. Westchester Ferry*, S.D. N.Y., 1958, 173 F. Supp. 637, 1959 A.M.C. 485, these cases are governed by the decision in *The Connecticut*, 1881, 103 U.S. 710, 712, 26 L. Ed. 467, 468, where the court said:

> "So far as The Stevens is concerned, she was clearly not to blame. She was the mere servant of The Connecticut, and could exercise no will of her own. She was bound to obey orders from The Connecticut, and no part of the responsibility of the navigation, so far as the approaching vessel was concerned, was on her. It was not her duty to signal the movements of The Connecticut, under whose exclusive control she was. . . ."

Of course, it need hardly be stated, the common ownership of the tug MAYE and the barge has nothing to do with the matter. *The Eugene F. Moran*, *supra*.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT EIKEL
1910 Tennessee Building,
Houston 2, Texas
Attorney for Petitioner

APPENDIX A

In The
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 17562

HORTON & HORTON, INC., Libelant, Appellant,

versus

THE S/S "ROBERT E. HOPKINS", ETC., TIDE WATER ASSOCIATED OIL COMPANY, INC., Claimant, Appellees

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Appeal from the United States District Court for the Southern District of Texas

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(June 30, 1959)

Before RIVES, CAMERON and JONES, Circuit Judges.

RIVES, Circuit Judge: This appeal is from an interlocutory decree[1] in admiralty finding two vessels in a collision at fault and directing that the damages be divided.

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[1] As permitted by 28 U.S.C.A. §1292

The Collision occurred in the Houston Ship Channel on December 12, 1955, at 11:30 P.M. The Channel is a narrow, busy one about 400 feet wide. The S/S Hopkins, an ocean-going tank vessel, was proceeding inland and the Tug Maye was going south pushing a flotilla consisting of two empty barges end-to-end, the after barge being secured along the portside of the Tug. Shortly before the collision, a heavy, dense fog had set in and visibility was poor—it was zero at the time of the collision. The angle of impact showed that the 260-foot tug and tow were broadside in the 400-foot channel. The front barge, Barge No. 121, was sunk, and nearby Beacon No. 70 was damaged.[2]

The district court held that each vessel was substantially at fault and found specifically:

> "I find that it is a clear case of mutual fault.
>
> "There was fault on the part of the Hopkins in proceeding at an excessive rate of speed under the circumstances, in failing to navigate with caution, in failing to keep a proper lookout, and in failing to stop immediately upon hearing fog signals ahead of her after knowing the presence, but not the position, of vessels in the channel.
>
> "The tug Maye and her tow were at fault in not knowing her position in the channel, in displaying improper lights in her tow, in violating the narrow channel rule, in failing to keep a

[2] The Government intervened and filed its claim for $1,800.00 damage to Beacon No. 70, and both appellant and appellees stipulated that the costs of repair to the beacon would be borne by the party or parties held liable.

proper lookout, and in failing to advise the Hopkins of her position with a searchlight.

"Each of the faults above set out that were committed by the respective parties was a major, gross, serious, substantial fault, and a decisive one that directly contributed to the collision in question."

The libelant, owner of the Tug Maye and Barge No. 121, appeals from this ruling, contending that gross negligence of the S/S Hopkins was the sole cause of the collision, and that faults of the Tug Maye and her tow did not contribute in any way to the collision. The appellee, owner of the S/S Hopkins, conceding that the evidence supports the finding of joint fault, cross-assigns errors contending that Barge No. 121, which was sunk in the collision, was unseaworthy because of an improper display of lights, that the Tug Maye was also at fault, and that, since three vessels were at fault, the libelant as owner of both the tug and the barge must bear a two-thirds share of the damage and can recover only one-third from the appellee.

After carefully studying the record, we are of the opinion that the trial court was not clearly erroneous[a] in its finding of mutual fault on the part of each vessel which contributed substantially to the collision. Indeed, there was such an abundance of evidence to support each finding made by the district court that we see no point in a detailed discussion of the testimony.

The district court allowed the cross-assignments of error to be filed without the filing of a notice of cross-

[a] See McAllister v. United States, 1954, 348 U.S. 19.

appeal by appellees. Both this Circuit and other Circuits have sanctioned that practice growing out of the original conception of an appeal in admiralty as a trial *de novo* in which it is the appellate court's duty to review the whole case and enter such decree as is proper.[1] It may be noted also that in the present case the cross-assignments of error and the order of the court permitting them to be filed were dated only eleven days after the entry of the interlocutory decree, well within the time allowed for the filing of notice of appeal. See 28 U.S.C.A. §2107. Further, the appellant does not object to our considering the cross-assignments of error, but to the contrary, upon oral argument, appellant's counsel, with commendable candor, recognized the practice as proper in admiralty cases. Under such circumstances, since we are dealing with a mere rule of practice not going to the *power* of the Court to review objections urged by the appellee,[2] we proceed to a consideration of the cross-assignments of error.

Appellees position, under its cross-assignments of error, is thus stated in brief:

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1 Pavlis v. Jackson, 5th Cir. 1942, 131 F.2d 362, 363; Stevens v. United States Lines Co., 1st Cir. 1951, 187 F.2d 670, 673; Edmond Weil, Inc. v. American West African Line, 2nd Cir. 1945, 147 F.2d 363, 364.

In Construction Aggregates Co. v. Long Island R. Co., 2nd Cir. 1939, 105 F.2d 1009, 1011, the lower court's decree held all three vessels liable in a collision and only the owners of one vessel appealed. The court stated that, "the owners of the other two vessels filed assignments of error, and the case thus became in substance an appeal by all." See also 1 Benedict on Admiralty, 6th ed., §§ 556 and 571; compare The Stephen Morgan, 1876, 94 U.S. 599; Langnes v. Green, 1931, 282 U.S. 531, 538.

2 Langnes v. Green, cited in footnote 1, supra.

"Since the improper display of lights on the Barge No. 121 resulted from the unseaworthiness of the barge as well as fault of the crew of the tug, the appellant, owner of both tug and barge, should bear two-thirds of the damages."

The district court found that "the Tug Maye *and her tow* were at fault . . . in displaying improper lights in her tow . . . ." (Italics supplied.) Barge No. 121 was within the class described as "barges, canal boats, scows and other nondescript vessels" under 33 C.F.R. §80.16a (a), (c), (h), (j)[6] and was required by that regulation,

[6] "§80.16a **Lights for barges, canal boats, scows and other nondescript vessels on certain inland waters on the Gulf Coast and the Gulf Intracoastal Waterway.**

"(a) On the Gulf Intracoastal Waterway and on other inland waters connected therewith or with the Gulf of Mexico from the Rio Grande, Texas, to Cape Sable (East Cape), Florida, barges, canal boats, scows, and other vessels of nondescript type not otherwise provided for, when being towed by steam vessels shall carry lights as set forth in this section.

"(c) When being towed alongside a steam vessel on the starboard side, a barge, canal boat, scow, or other vessel of nondescript type not otherwise provided for shall have a green light on the starboard bow, and when being towed alongside on the port side, a red light on the port bow.

"(h) The colored side lights described in this section must be fitted with inboard screens so as to prevent them from being seen more than half a point across the bow, of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least three miles, so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, and so fixed as to throw the light from right ahead to two points abaft the beam on either side.

"(j) All lights described in this section shall be carried at least eight feet above the surface of the water and at approximately the same height."

when being propelled by a steam vessel on the starboard side, to display a red light on her port bow at least eight feet above the water so as to be visible from right ahead to two points abaft the beam (22-1/2 degrees) on the portside and to be visible on a dark night with a clear atmosphere for at least three miles.[3] Instead, the evidence shows that Barge No. 121 had only a white kerosene lantern near the port bow, about seven feet above the surface of the water and not visible abaft the beam. Since the S/S Hopkins hit Barge No. 121 near the stern on the portside at nearly right angles, the evidence indicates that this light could not have been seen by the S/S Hopkins, but that a proper light placed in accordance with the regulations might possibly have been seen.

Appellees say that, since the S/S Hopkins' pilot testified that he saw no lights on any vessel and since it is undisputed that visibility was zero or close to zero, the color and location of the lights could not have contributed to cause the collision and there is no reasonable basis in the evidence to so conclude. There is an absence of proof to support that position. Appellant adduced no evidence as to the power of the white kerosene lantern, as to the visibility of a regulation red light under the circumstances, as to the power of the fixed lights, if any, on the Tug J.T. Stillman and her tow which were in nearby proximity to the accident, or as to the lighting of the Tug Maye.

Since the appellees established the statutory fault of improper lighting on Barge No. 121, it was the appellant's burden to prove that such improper lighting could not

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[3] Even had the Tug Maye been carrying lawful side lights, they were required to be visible for only two miles. 33 USCA §172 (b) (c).

have contributed to the collision.[a] This burden the appellant failed to carry.

We hold, therefore, that the collision between the barge and the steamship was due (a) to the fault of the S/S Hopkins in the ways listed by the district court, (b) to the fault of the Tug Maye in the ways listed by the district court, and (c) to the separate fault of the Barge No. 121 in being improperly lighted. Since the three vessels were separately at fault, and since the barge and tug were the property of appellant, only one-third of the damage is attributed to the appellees.[b] Therefore, the total damage—to the Barge No. 121 and to the Beacon No. 70—together with interest and cost in the lower court will be borne one-third by appellees and two-thirds by appellant. The cost of this appeal is taxed against the appellant, and the interlocutory decree is

MODIFIED AND AFFIRMED.

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[a] The Pennsylvania, 1873, 19 Wallace 125, 136.

[b] The Eugene F. Moran, 1909, 212 U.S. 466; 475; Moran Towing & Transp. Co.; Inc. v. Empresa Hondurena De V. et al., 5th Cir. 1952, 194 F.2d 629, 632; United States v. S/S Washington, 4th Cir. 1957, 241 F.2d 819, 825; The Socony No. 123, 2nd Cir. 1935, 78 F.2d 536; The Sif, 2nd Cri. 1920, 266 Fed. 166; Adams v. The Peter Moran, S.D.N.Y. 1950, 91 F.Supp. 520.

APPENDIX B

In The

DISTRICT COURT OF THE UNITED STATES

For the Southern District of Texas
Houston Division

HORTON & HORTON, INC., Libellant	§	
v.	§	
SS ROBERT E. HOPKINS, Her Engines, Boilers, etc., and	§	A. D. NO. 1391
TIDE WATER ASSOCIATED OIL COMPANY, Respondents	§	

Robert Eikel, of Houston, Texas, for Libellant

Fulbright, Crooker, Freeman, Bates & Jaworski, (Joseph Newton), of Houston, Texas, for Respondent.

William B. Butler, U. S. Attorney, (James E. Ross), Houston, Texas, Intervenor.

June 26, 1958

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

This is a case of a collision in the Houston Ship Channel between barge No. 121, owned by Libellant, and the SS ROBERT E. HOPKINS (hereinafter called "HOPKINS"), owned by Respondent.

This channel is a narrow, busy one.

The collision happened on December 12, 1955 at about 11:30 P.M. Barge No. 121 was sunk and nearby Beacon No. 70 was damaged. Said barge is a wooden sand barge 110 feet long, 30 feet wide, with a depth of 7 feet. Before the collision, it was being pushed by the tug MAYE in a flotilla that consisted of this barge in front and another barge end to end.

The HOPKINS is an ocean-going tank vessel of approximately 10,296 gross tons, 504 feet long, 57 feet wide, with a depth of 35 feet.

Shortly before the collision, a heavy, dense fog had set in and the visibility was very poor.

The angle of impact showed that the tug and her tow were nearly broadside in the channel, and such tug with its tow measured about 260 feet in this 400-foot channel.

Each party alleges fault on the part of the other.

I find that it is a clear case of mutual fault.

There was fault on the part of the HOPKINS in proceeding at an excessive rate of speed under the circumstances, in failing to navigate with caution, in failing to keep a proper lookout, and in failing to stop immediately upon hearing fog signals ahead of her after knowing the presence, but not the position, of vessels in the channel.

The tug MAYE and her tow were at fault in not knowing her position in the channel, in displaying improper lights in her tow, in violating the narrow channel rule, in failing to keep a proper lookout, and in failing to advise the HOPKINS of her position with a searchlight.

Each of the faults above set out that were committed by the respective parties was a major, gross, serious, sub-

stantial fault, and a decisive one that directly contributed to the collision in question.

CONCLUSIONS OF LAW

1.

I conclude as a matter of law that the subject matter of this litigation, to-wit, a maritime collision, is within the admiralty and maritime jurisdiction of this Court, 28 U.S.C.A., Section 1333.

2.

I conclude as a matter of law that each of the faults chargeable to the respective party so committing same was negligence and such negligence was a proximate cause of the collision in question.

3.

I conclude as a matter of law that each of such faults was a major, gross, serious, substantial fault.

4.

I conclude as a matter of law that such collision was not the result of an unavoidable accident.

5.

Accordingly, I conclude that the damages should be divided equally between the Libellant and the Respondents, including the damage to Beacon No. 70.

/s/ ALLEN B. HANNAY,
United States District Judge

TRUE COPY I CERTIFY

ATTEST:

V. BAILEY THOMAS, Clerk
By WM. H. COSTA, Deputy Clerk